No. 06-779

Filed
Feb. 5, 2007

IN THE SUPREME COURT OF THE UNITED STATES

UNIVERSITY OF PUERTO RICO, *Petitioner*,

v.

IVÁN TOLEDO, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a territory can assert sovereign immunity against a suit brought to enforce an Act of Congress that abrogates sovereign immunity.

2. Whether Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, validly abrogates state sovereign immunity as applied to the class of cases involving public education.

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STATEMENT

This case presents the question whether the University of Puerto Rico, an arm of the Commonwealth of Puerto Rico, has sovereign immunity against Respondent Iván Toledo's claim that the University violated his rights under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* (Title II). Toledo, who has schizoaffective disorder, Pet. App. 3, filed this case *pro se* in the District Court for the District of Puerto Rico. Because the case comes to this Court on a motion to dismiss, the Court must take as true the allegations in the complaint. See, *e.g.*, *Anza v. Ideal Steel Supply Co.*, 126 S. Ct. 1991, 1994 (2006).

1. In August of 1999, Toledo enrolled as a first-year student in the School of Architecture at the University's Río Piedras campus. Pet. App. 3. "[D]uring the first semester his mental condition deteriorated, causing him to experience anxiety, panic, and depression." *Id.* As a result, he "was unable to attend classes regularly for part of the semester." *Id.* When Toledo returned to his regular academic schedule in October of that year, he sought an accommodation to enable him to complete an exercise that had been assigned to the students in his Design Fundamentals I class while he was absent. Third Amended Cplt. ¶¶ 6.6-6.7. But the professor "refus[ed] to make any accommodation." Pet. App. 3. Toledo was forced to turn in an incomplete assignment, "which the professor ridiculed in front of the class." *Id.* at 3-4. Toledo continued to request accommodations in the Design

Fundamentals class, but both the professor and Toledo's academic counselor refused to consider those accommodations. Third Amended Cplt. ¶¶ 6.9-6.12. Throughout the academic year, the Design Fundamentals professor continued, "on account of Toledo's mental disability," to "criticize [Toledo's] work negatively in a manner different from" the way he treated the other students. *Id.* ¶ 6.12. Toledo ultimately received a "D" in the course. Pet. App. 4.

In August of 2000, as he was about to begin the second year of his program, "Toledo suffered an emotional crisis, attempted suicide, and was hospitalized for some time." *Id.*; Third Amended Cplt. ¶¶ 6.15-6.16. His psychiatrist released Toledo to return to school on September 1 of that year, Third Amended Cplt. ¶ 6.17, but his medication had side effects that made him often arrive late to his morning Architectural Design class, *id.* ¶ 6.19. Toledo asked for an accommodation that would permit him to arrive up to forty-five minutes late to class or that would make class participation less relevant in his grade. *Id.* But both the professor and the Dean of the School of Architecture refused that request. *Id.* ¶¶ 6.19, 6.22.

To the contrary, Toledo's Architectural Design professor responded by "suggest[ing] that plaintiff abandon his prescription medication[s] because, according to her, they were the principal obstacle to his timely arrival in the classroom." *Id.* ¶ 6.20. The professor "would refuse to acknowledge plaintiff's presence in the classroom when he arrived late," but she "would not do

anything when the other students, who did not suffer from a mental disability, showed up late." *Id.* ¶ 6.21. In late October, "[f]rustrated and desperate because of his failure to obtain a reasonable accommodation and the prejudices" he confronted, Toledo was hospitalized again with "hallucinations, panic attacks, suicidal ideas, and depression." *Id.* ¶¶ 6.23-6.24. He was released on October 27 and completed the term, but he received a failing grade in Architectural Design. *Id.* ¶¶ 6.24, 6.34.

Toledo requested accommodations for his Architectural Design II course in the spring semester, but the Dean rejected the request. *Id.* ¶¶ 6.32-6.33. He then requested that he be permitted to take courses at another university to preserve his academic standing, but the University again rejected the request. *Id.* ¶ 6.35. As a result, "Toledo dropped out of school entirely." Pet. App. 4.

2. On July 20, 2001, Toledo filed his complaint in the district court. R. 1. Still acting *pro se*, he amended the complaint twice: on July 24 and August 7. R. 4, 7. His current claims appear in the Third Amended Complaint, filed by counsel on February 14, 2005. R. 109.[1] That complaint asserts claims under: Title II; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794;

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[1] Although the Third Amended Complaint was filed three days after Petitioners filed their notice of interlocutory appeal, the Court of Appeals focused its analysis on that complaint and declined the United States' suggestion that it remand to permit the District Court to consider that pleading in the first instance. Pet. App. 6-8 & nn.2-3.

42 U.S.C. § 1983; Puerto Rico's Constitution; and the Commonwealth's antidiscrimination statutes. Third Amended Cplt. ¶¶.

Petitioner moved to dismiss the Title II claim on Eleventh Amendment grounds. R. 20. On September 8, 2002, the District Court granted that motion. R. 81. Following its earlier decision in *Badillo Santiago v. Andréu Garcia*, 167 F. Supp.2d 194 (D.P.R. 2001), vacated, 378 F.3d 1 (1st Cir. 2004), the court concluded that "Title II of the ADA did not validly abrogate the States' sovereign immunity." R. 81 at 2. But after this Court held that Title II did validly abrogate state sovereign immunity as applied to cases involving access to the courts, *Tennessee v. Lane*, 541 U.S. 509 (2004), the District Court granted Toledo's motion for reconsideration and denied Petitioner's motion to dismiss. Pet. App. 31-33.

Petitioner took an interlocutory appeal, and the First Circuit affirmed. Pet. App. 1-25. Both Respondent Toledo and the United States (which intervened to defend the constitutionality of Title II) argued that, pursuant to the Territory Clause, U.S. Const., Art. IV, § 3, cl. 2, the Commonwealth of Puerto Rico was not entitled to sovereign immunity against a federal statutory claim. But the Court of Appeals summarily rejected that argument. *Id.* at 5 n.1 ("We have held on numerous occasions that Puerto Rico is a state for Eleventh Amendment immunity purposes."). Nonetheless, the court concluded that "Title II, as it applies to the class of cases implicating the right of access to public education, constitutes a valid exercise of Congress' §

5 authority to enforce the guarantees of the Fourteenth Amendment." *Id.* at 24. Accordingly, it held that "state sovereign immunity is not a defense to this action." *Id.*

In reaching that conclusion, the Court of Appeals followed the analysis dictated by *Lane* and *United States v. Georgia*, 126 S. Ct. 877 (2006). The court determined that none of Toledo's Title II claims "independently states a violation of the Fourteenth Amendment." Pet. App. 9-12. But it held that, in the public education context, Title II and its abrogation of sovereign immunity are nonetheless "valid as a prophylactic measure within Congress's § 5 power." *Id.* at 12. The court looked to the important constitutional rights at stake in the public education context, see *id.* at 16-17, the extensive, judicially documented record of States' violation of those rights, see *id.* at 17-21, and the limited nature of the remedy Title II creates, see *id.* at 21-23. The Court of Appeals also noted that its ruling was in accord with the rulings of the other two appellate courts to decide "whether Title II validly abrogates state sovereign immunity in the context of public education." *Id.* at 23 (citing *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005); *Association for Disabled Americans v. Florida Int'l Univ.*, 405 F.3d 954, 959 (11th Cir. 2005))

REASONS FOR DENYING THE WRIT

Petitioner, the University of Puerto Rico, asks this Court to decide whether Title II of the Americans with Disabilities Act validly abrogates

state sovereign immunity "in the context of public higher education." Pet. i. But there is no conflict in the circuits on that question. To the contrary, the First Circuit's correct decision here is entirely consistent with the decisions of the Third, Fourth, and Eleventh Circuits—the only three other circuits to have considered the question since *Tennessee v. Lane*, 541 U.S. 509 (2004). Nor would this case be an appropriate vehicle to decide the question in any event. For one thing, Puerto Rico is a territory, not a State. Pursuant to the Territory Clause, Congress has plenary authority to abrogate Puerto Rico's sovereign immunity; it need not satisfy the "congruence and proportionality" standard of *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), to do so. For another, the Title II abrogation issue will have no effect on the ultimate outcome of this case; Respondent Toledo's Rehabilitation Act claim, which unquestionably overcomes sovereign immunity, will give him all the relief he could obtain under Title II in any event. This Court's review should await the emergence of an actual conflict in the circuits, as well as a case that actually presents the question of *state* sovereign immunity under Title II.

A. There is No Conflict in the Circuits

1. Petitioner asserts (Pet. 15) that the First Circuit's decision in this case implicates "widespread conflict and confusion in the lower courts." That is incorrect. Under the context-specific approach that this Court mandated in *Lane*, 541 U.S. at 530-531, the relevant question is whether Title II validly abrogates state sovereign immunity in the education context. The courts of

appeals to have decided that question have uniformly answered it in the affirmative.

This Court addressed the validity of Title II's abrogation of state sovereign immunity for the first time in *Lane*, 541 U.S. at 522. Refusing "to consider Title II, with its wide variety of applications, as an undifferentiated whole," *id.* at 530, the Court held that the validity of the statute's abrogation must take account of the particular context in which the plaintiff seeks to apply the ADA:

> Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even voting booths, but whether Congress had the power under § 5 [of the Fourteenth Amendment] to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.

Id. at 530-531. Last Term, in *United States v. Georgia*, 126 S. Ct. 877 (2006), this Court reaffirmed *Lane*'s requirement of a context-specific analysis. The Court emphasized that the question whether Title II abrogates state sovereign immunity should be determined "on a claim-by-claim basis." *Id.* at 882.

Recognizing that *Lane* and *Georgia* require a context-specific analysis, Petitioner asks this Court to decide whether Title II's abrogation of sovereign immunity is valid "in the context of public higher education." Pet. i. But there is no conflict in the circuits regarding that question. To the contrary,

every court of appeals to consider that question has ruled that Title II *does* validly abrogate state sovereign immunity in the higher-education context. See Pet. App. 12-23 (decision below); *Bowers v. National Collegiate Athletic Ass'n*, No. 05-2262, slip op. 63-65 (3d Cir., Feb. 1, 2007) (holding, in a higher education case, that Title II validly abrogated sovereign immunity in public education); *Constantine*, 411 F.3d at 490 (Fourth Circuit decision holding "that Title II of the ADA is valid § 5 legislation, at least as it applies to public higher education"); *Association for Disabled Americans, Inc.*, 405 F.3d at 957-959 (Eleventh Circuit decision holding that Title II is valid Section 5 legislation as applied to education in a case brought against a state university).

Petitioner cannot point to a single appellate case that has reached a different result in the education context. Instead, it can point only to the following allegedly conflicting authority: (1) a Fifth Circuit education case that (in Petitioner's own words) "declined to rule on this question," Pet. 14 (citing *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 287 (5th Cir.) (*en banc*), cert. denied, 126 S.Ct. 416 (2005)); (2) an Eighth Circuit case that (again in Petitioner's own words) "did not involve higher education," *id.* at 11 (citing *Klingler v. Director, Dep't of Revenue*, 455 F.3d 888 (8th Cir. 2006)); (3) two now-vacated circuit court opinions addressing Title II's application to prison conditions, see *id.* at 13 (citing *Cochran v. Pinchak*, 401 F.3d 184 (3d. Cir.), vacated, 412 F.3d 500 (3d Cir. 2005); and *Miller v. King*, 348 F.3d 1248 (11th

Cir. 2004), vacated, 449 F.3d 1149 (11th Cir. 2006)); and (4) decisions of "[s]everal district courts," not all of which even involve education, *id.* at 12-13 (citing cases).

None of these cases even remotely creates a circuit split. That the Fifth Circuit has reserved the question—and several district courts have issued conflicting rulings—merely provides the opportunity for further percolation in the courts of appeals. Should a conflict in the circuits emerge, there will be time enough then for this Court to address the validity of Title II's abrogation of sovereign immunity in the education context. The vacated decisions of the Third and Eleventh Circuits cannot create a conflict, see *O'Connor v. Donaldson*, 422 U.S. 563, 578 n.2 (1975) (vacatur of judgment deprives opinion of precedential effect), and those cases did not involve the education context in any event. Indeed, both circuits have upheld Title II's abrogation of sovereign immunity in the higher-education context.

The Eighth Circuit's decision in *Klingler*, *supra*, is the only post-*Lane* circuit-court case still on the books that even partially invalidated Title II's abrogation of sovereign immunity. But that case involved a context quite far removed from public education. There, plaintiffs with disabilities sued Missouri to challenge the $2 annual fee the State charged for the use of a removable handicapped parking placard. *Klingler*, 455 F.3d at 891. (The fee applied only to *removable* parking placards; handicapped license plates, which carried the same parking privileges as the placards, were available

without any surcharge. See *id.* at 894.) In determining that Missouri was immune from the plaintiffs' request for damages, the Eighth Circuit explicitly stated that "Title II may validly abrogate the states' sovereign immunity in some cases"; it simply did "not believe that the present case is one of them." *Id.* at 892. The court concluded that neither a prophylactic nor a remedial purpose could justify Congress in prohibiting Missouri "from imposing a reasonable surcharge to cover the costs of its program benefiting the disabled" in the parking context. *Id.* at 896. Instead, the prohibition effectively sought "to redefine the scope of protection offered by the Constitution." *Id.* at 896-897.

By its terms and its rationale, the Eighth Circuit's decision in *Klingler* says absolutely nothing about the public education context. As the First Circuit's opinion in this case makes clear, disability discrimination in public education implicates far more robust constitutional rights, and is part of a much more widespread history and pattern of constitutional violations, than is a State's decision to charge $2 for a parking placard. See Pet. App. 16-21. Petitioner is simply incorrect to assert that the circuits are divided over the question presented in the petition for certiorari.

2. Petitioner also asserts (Pet. 16-19) that certiorari is warranted to resolve "[w]idespread [u]ncertainty" about a number of abstract questions relating to this Court's Section 5 and abrogation jurisprudence. Petitioner does not point to *any* division in the circuits on these issues—much less any

division in the circuits since *Lane* and *Georgia*—so the uncertainty can hardly be as widespread as Petitioner suggests. In any event, given the absence of any concrete conflict as to the application of *Lane* and *Georgia*, there is no basis for granting certiorari to resolve any alleged "uncertainty" regarding the abstract questions Petitioner raises.

B. Because Puerto Rico is Not a State, and Congress Has Plenary Power to Abrogate its Sovereign Immunity, This Case Offers a Poor Vehicle for Deciding the Question Presented

1. For the reasons set forth in the previous section, the question whether Title II of the ADA validly abrogates state sovereign immunity in the public higher education context is not one that warrants the exercise of this Court's certiorari jurisdiction. Even if it did, this case would not offer the Court an occasion to decide the question. The Commonwealth of Puerto Rico is a territory, not a State. See, *e.g.*, *Harris v. Rosario*, 446 U.S. 651, 651 (1980) (*per curiam*). Although this Court's cases such as *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), restrict Congress's power to abrogate the sovereign immunity of States, Congress retains plenary authority to abrogate Puerto Rico's sovereign immunity pursuant to the Territory Clause.

The court of appeals held, consistent with its longstanding precedent, "that Puerto Rico is a state for Eleventh Amendment purposes," and that Congress's effort to abrogate Puerto Rico's sovereign immunity must satisfy the same standards as those that govern efforts to abrogate a State's sovereign immunity. Pet. App. 5 n.1. See, *e.g.*, *Ramirez v. Puerto Rico Fire*

Serv., 715 F.2d 694, 697 (1st Cir. 1983) ("Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects."). That holding fails to appreciate the fundamental constitutional difference between territories and States.[2]

As this Court has repeatedly explained, sovereign immunity is an aspect of the "'residuary and inviolable sovereignty,'" which "the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden v. Maine*, 527 U.S. 706, 713, 715 (1999) (quoting The Federalist No. 39, at 245 (Clinton Rossiter, ed., 1961) (James Madison)). See *Northern Ins. Co. v. Chatham County*, 126 S. Ct. 1689, 1693 (2006); *Federal Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 751-753 (2002); *Seminole Tribe*, 517 U.S. at 54. "The States have consented . . . to some suits pursuant to the plan of the Convention or to subsequent constitutional Amendments"—notably suits by the Federal Government or other States, and suits pursuant to valid Fourteenth Amendment legislation. *Alden*, 527 U.S. at 755. But this Court has held that they have not surrendered their immunity to suits by private parties pursuant to ordinary Article I legislation. *See id.* at 754; *Florida Prepaid*

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[2] Both Respondent Toledo and the United States argued in the Court of Appeals that the Section 5 analysis was unnecessary because Congress has plenary authority under the Territory Clause to abrogate Puerto Rico's sovereign immunity. See Toledo C.A. Br. 14-15; U.S. C.A. Br. 7 n.3. The Court of Appeals summarily rejected that argument as inconsistent with circuit precedent. Pet. App. 5 n.1.

Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 636 (1999); *Seminole Tribe*, 517 U.S. at 59-66.

"A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law." *Northern Ins. Co.*, 126 S. Ct. at 1693. Territories such as Puerto Rico, of course, have retained no "preratification sovereignty." This Court has long emphasized that fundamental constitutional distinction between States and territories: "The government of a state does not derive its powers from the United States, while the government of [a territory] owes its existence wholly to the United States . . . ." *Grafton v. United States*, 206 U.S. 333, 354 (1907).

Pursuant to the Territory Clause, Congress may "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2. Although Congress may delegate power to the territorial government, it retains the power "to revise, alter, and revoke" that delegation at any time. *Christianson v. King County*, 239 U.S. 356, 365 (1915) (internal quotation marks omitted). See *First Nat'l Bank v. Yankton County*, 101 U.S. 129, 133 (1879) (Congress need not specifically reserve its power to amend acts of territorial legislature but may exercise that power at any time as "an incident of sovereignty"). The limitations that apply when Congress seeks to regulate the States therefore do not constrain efforts to regulate a territory. Congress "has full and complete legislative

authority over the people of the Territories and all the departments of the territorial governments." *First Nat'l Bank*, 101 U.S. at 133.

Puerto Rico plainly has sovereign immunity against common-law claims. But that is only because Congress has not abrogated that immunity. See *People of Porto Rico v. Rosaly*, 227 U.S. 270, 277 (1913) (holding that Puerto Rico has common-law sovereign immunity, because Congress did not abrogate it in the territory's organic act). Cf. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (noting that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers" but that "[t]his aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress"). When Congress passes a statute subjecting Puerto Rico to private suits, the Territory Clause gives it plenary authority to do so. Title II of the ADA is just such a statute. Whether or not Congress had power under Section 5 of the Fourteenth Amendment to subject a State to suit under that statute in the public education context, it plainly had power under the Territory Clause to subject the Commonwealth of Puerto Rico to suit.[3]

Because the validity of Congress's abrogation of Puerto Rico's sovereign immunity does not depend on the Fourteenth Amendment, this

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[3] Moreover, the Treaty of Paris, under which Spain ceded Puerto Rico to the United States, specifically provided that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Treaty of Paris, Art. IX, 30 Stat. 1754, 1759 (Dec. 10, 1898).

Court would not be able to reach the question Petitioner presents if it granted certiorari. Accordingly, this case is not an appropriate vehicle for deciding that question. In that respect, this case is different from *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), in which this Court granted Puerto Rico's petition for certiorari to decide whether a claim of sovereign immunity can be asserted on an interlocutory appeal. *Puerto Rico Aqueduct* required the Court to decide *when* Puerto Rico could raise its claim of sovereign immunity. But in resolving the case, the Court had no need to address whether the Commonwealth was entitled to sovereign immunity; indeed, the Court specifically reserved that question. *See id.* at 141 n.1. Moreover, *Puerto Rico Aqueduct* involved a diversity action for breach of contract and damage to business reputation. *See id.* at 141. Accordingly, the case implicated only the common-law sovereign immunity this Court recognized in *Rosaly, supra*; it did not implicate Congress's power under the Territory Clause to abrogate that immunity.

Here, unlike in *Puerto Rico Aqueduct*, this Court could not reach the question Petitioner presents without first deciding that the Commonwealth of Puerto Rico has the same sovereign immunity as do the States, and that the power of Congress to abrogate the Commonwealth's sovereign immunity is limited in just the same way as if it were dealing with the States. Because such a decision would be inconsistent with the Territory Clause and this

Court's cases interpreting it, the Court likely would not be able to reach the question presented at all.

2. Even if that hurdle could be overcome, before the Court could reach the question presented it would likely have to resolve a difficult statutory issue on which the circuits are in conflict—an issue the First Circuit did not reach in this case. The D.C. Circuit has held that a provision of the Puerto Rican Federal Relations Act effectively applies this Court's state sovereign immunity cases, *mutatis mutandis*, to Puerto Rico. See *Rodriguez v. Puerto Rico Federal Affairs Admin.*, 435 F.3d 378, 381 (D.C. Cir.), cert. denied, 127 S.Ct. 347 (2006). That provision, 48 U.S.C. § 734, states that "[t]he statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States [with certain exceptions]."

But the Ninth Circuit has read similar language in the Commonwealth Covenant of the Northern Mariana Islands (CNMI), 48 U.S.C. § 1801 note, § 502(a)(2), quite differently. According to the Ninth Circuit, the relevant language merely provides that federal statutes apply in the Commonwealth; it does not extend to the Commonwealth's government any of the constitutional immunities that States have against federal regulation. See *Norita v. Commonwealth of the Northern Mariana Islands*, 331 F.3d 690, 692-697 (9th Cir. 2003). As the Ninth Circuit explained, the Covenant contains a separate section that specifically applies to the CNMI government some

provisions of the Constitution that apply to States, but that section does not reference the Eleventh Amendment. See *id.* at 693-694. The same is true of the Puerto Rican Federal Relations Act. See 48 U.S.C. § 737.

The Court of Appeals did not address the impact of the Federal Relations Act in this case. But in an earlier case that held, under "the guidance provided by the Federal Relations Act," that the Fair Labor Standards Act did not abrogate Puerto Rico's sovereign immunity, the First Circuit ruled that the question whether a federal statute effects such an abrogation turns on Congress's intent in passing that statute. *Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34, 39-44 (1st Cir. 2000). Although it read the Federal Relations Act as instructing courts to "refrain from inferring that statutes which have limited effect upon the fifty states silently apply with greater force to Puerto Rico," the First Circuit ultimately grounded its decision as well in "the language of the FLSA, [and] the context in which Congress amended it to reach public agencies." *Id.* at 44. And the court recognized that "it is frequently the case when examining the text of a statute for its applicability to Puerto Rico that the language is not free of ambiguity, the purposes appear to be diverse and sometimes contradictory, and the circumstances are not fully spread upon the record for our instruction." *Id.* at 40 (internal quotation marks omitted). That the Court would be forced to confront the complex issue of how the Federal Relations

Act applies to the ADA—an issue on which the First Circuit expressed no view—offers yet another compelling reason to deny certiorari.

In short, because it is the Commonwealth of Puerto Rico—and not a State—that is the party asserting immunity, this case is a poor vehicle for elaborating on the scope of Congress's power to abrogate state sovereign immunity.

C. Because Respondent Toledo Also Brought a Claim Under the Rehabilitation Act, the Question Presented Will Not Affect the Outcome of This Case

Even if the Commonwealth of Puerto Rico had precisely the same sovereign immunity as a State, this would still not be a proper case in which to grant review. In addition to his ADA claim, Toledo also sought relief under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The substantive requirements of Section 504 are virtually identical to those of Title II of the ADA.[4] And the remedies for violation of the two statutes are completely identical. Congress specifically directed that the "remedies, procedures, and rights" provided under Section 504 "shall be the remedies, procedures and rights" provided under Title II. 42 U.S.C. § 12133; *see Barnes v. Gorman*, 536 U.S. 181, 184-185, 189 n.3 (2002). Accordingly, Section 504

[4] Compare 29 U.S.C. § 794 (prohibiting disability-based discrimination in programs or activities receiving federal financial assistance), with 42 U.S.C. § 12132 (prohibiting disability-based discrimination by any "public entity"); see 42 U.S.C. § 12134(b) (requiring Title II's implementing regulations to "be consistent with" Section 504's earlier implementing regulations).

will provide Toledo with all of the relief to which he would be entitled under Title II.

Whatever questions exist regarding the validity of the abrogation of sovereign immunity under Title II, there can be no doubt that Congress has the power to authorize damages awards against the programs and activities covered by Section 504. Every court of appeals to have addressed the issue has held, under the principles articulated in cases such as *South Dakota v. Dole*, 483 U.S. 203, 210-212 (1987), and *College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board*, 527 U.S. 666, 686-687 (1999), that States that receive federal funds validly waive their sovereign immunity against suits challenging discrimination under Section 504.[5] Because Petitioner receives federal funds, Third Amended Cplt. ¶ 4.8, it validly waived its sovereign immunity against Toledo's Section 504 claim.

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[5] See *Pace*, 403 F.3d at 280-287; *Barbour v. Washington Metro. Transit Auth.*, 374 F.3d 1161, 1164-1170 (D.C. Cir. 2004), cert. denied, 544 U.S. 904 (2005); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128-130 (1st Cir. 2003); *Garrett v. University of Alabama at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1293 (11th Cir. 2003) (*per curiam*); *Koslow v. Pennsylvania*, 302 F.3d 161, 170-172 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003); *Robinson v. Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Nihiser v. Ohio E.P.A.*, 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Jim C. v. United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (*en banc*), cert. denied, 533 U.S. 949 (2001); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). But cf. *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 114 n.4 (2d Cir. 2001) (State did not knowingly waive sovereign immunity against suit under Section 504 where conduct took place between 1993 and 1995—before *Seminole Tribe* and *City of Boerne* put States on notice that the ADA's abrogation of sovereign immunity might be questionable).

The Title II abrogation issue is thus irrelevant to Toledo's eventual recovery. Even if Title II did *not* validly abrogate state sovereign immunity, Section 504 would provide Toledo with exactly the same relief he would have received under Title II. Accordingly, this is not an appropriate case in which to decide the Title II question. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ of certiorari as improvidently granted when the issue on which certiorari had been granted would have no effect on the outcome of the underlying case). Review of the Section 5 basis for Title II's abrogation "can await a day when the issue is posed less abstractly." *Id.*

D. The First Circuit's Section 5 Ruling was Correct

In any event, there is no reason to disturb the First Circuit's judgment in this case. Even if Congress must satisfy the requirements of Section 5 of the Fourteenth Amendment when it abrogates Puerto Rico's sovereign immunity, the First Circuit was correct that those requirements were plainly satisfied here.

1. In concluding that "Title II, as it applies to the class of cases implicating the right of access to public education, constitutes a valid exercise of Congress' § 5 authority," Pet. App. 24, the First Circuit engaged in

precisely the inquiry this Court set forth in *Boerne* and *Lane*. First, considering "the constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 541 U.S. at 522, the court noted that more was at stake in the education context than the Fourteenth Amendment's baseline prohibition of irrational discrimination. See Pet. App. 16-17; *Lane*, 541 U.S. at 522. Instead, "[t]he Supreme Court's Equal Protection Clause and Due Process Clause jurisprudence places a special emphasis on the constitutional rights implicated by discrimination in public education." Pet. App. 16.

For purposes of equal protection analysis, public education is "is not a 'right' granted to individuals by the Constitution," but "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)). As the First Circuit noted, *Plyler* forbids a State from "categorically deny[ing] disabled students access to public education." Pet. App. 16. See also *Board of Educ. v. Rowley*, 458 U.S. 176, 192-194, 199-200 (1982) (citing with approval lower court cases that held that the Equal Protection Clause prohibits States from excluding individuals with disabilities from public education). Moreover, "a student's legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause." *Goss v. Lopez*, 419 U.S. 565, 574 (1975). In light of these principles, prophylactic Section 5 legislation is

far more appropriate in the education context than it was in the employment context of *Board of Trustees v. Garrett*, 531 U.S. 356 (2001); see *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 676 (1996) ("[T]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.") (internal quotation marks omitted).

Second, the Court of Appeals considered "whether there is a history of a violation" of the constitutional rights of students with disabilities. Pet. App. 17; see *Lane*, 541 U.S. at 523 ("Whether Title II validly enforces these constitutional rights is a question that 'must be judged with reference to the historical experience which it reflects.'") (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). As the court recognized, "the thirty years preceding the enactment of the ADA evidence a widespread pattern of states unconstitutionally excluding disabled children from public education and irrationally discriminating against disabled students within schools." Pet. App. 21. The court based that conclusion in part on "[n]umerous lower court decisions"—both before and after Congress enacted legislation such as the Rehabilitation Act of 1973 and the Education of All Handicapped Children Act—that "demonstrate[d] that the states were violating the Due Process and Equal Protection rights of disabled children by completely denying them educational opportunities" and otherwise unconstitutionally

discriminating against them. Pet. App. 18-21.[6] As this Court noted in *Lane*, 541 U.S. at 525 & n.12, those and other judicial decisions "document a pattern of unequal treatment in the administration of . . . public education."

But the First Circuit did not rely exclusively on the decided cases. The court also looked to a "report before Congress in 1983," which "indicated that tens of thousands of disabled children continued to be excluded from public schools or placed in inappropriate programs." Pet. App. 21 (citing U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 28-29 (1983)). And the court noted testimony presented to Congress in the hearings that considered the proposed ADA, which "included statements by numerous disabled individuals who had been excluded from participation or faced prejudice *at all levels* of public education." *Id.* (emphasis added) (citing Staff of House Comm. on Educ. & Labor, *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* (Comm. Print 1990) (hereinafter "*Leg. Hist.*")). Taken together, the First Circuit concluded, the "record of persistent unconstitutional state action, coupled with the inability of earlier federal legislation to solve this 'difficult and intractable problem,'"

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[6] The First Circuit cited *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 293, 297 (E.D. Pa. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972); *Harrison v. Michigan*, 350 F. Supp. 946, 958 (E.D. Mich. 1972); *Fialkowski v. Shapp*, 405 F. Supp. 946, 958 (E.D. Pa. 1975); *Hairston v. Drosick*, 423 F. Supp. 180, 184 (S.D.W.Va. 1976); *Cuyahoga County Ass'n for Retarded Children & Adults v. Essex*, 411 F. Supp. 46, 58-59 (N.D. Ohio 1976); *Panitch v. Wisconsin*, 444 F. Supp. 320, 322 (E.D. Wis. 1977); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 466 F. Supp. 487, 504 (E.D.N.Y. 1979).

justified the enactment of "prophylactic § 5 legislation." *Id.* at 21 (quoting *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 735, 737 (2003)).

Finally, the Court of Appeals considered "whether the provisions of Title II, as applied to public educational institutions, are a congruent and proportional response to this history and pattern of unconstitutional discrimination." Pet. App. 21; see *Lane*, 541 U.S. at 530 ("The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment."). The court concluded that the obligations imposed by the statute in the education context were "not disproportionate to the need to protect against the outright exclusion and irrational disability discrimination that such students experienced in the recent past." Pet. App. 24. Just as this Court did in *Lane*, 541 U.S. at 531-532, the First Circuit emphasized that "the obligations imposed by Title II are limited in several ways that minimized the compliance costs imposed on states." Pet. App. 23. And, crucially, "the ADA does not require public schools and universities to accommodate disabled students if the accommodation would substantially alter their programs or lower academic standards, and courts give due deference to the judgment of education officials on these matters." *Id.*

The First Circuit's opinion reflects nothing more than a straightforward application of this Court's decisions in *Boerne* and *Lane*. Just as in the access-to-courts context addressed in *Lane*, in the education

context the ADA is "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Lane*, 541 U.S. at 533. There is no basis for this Court to disturb the judgment below.

2. Petitioner raises three challenges to the First Circuit's decision. None has merit.

a. First, Petitioner contends (Pet. 19-22) that the Court of Appeals improperly focused on the context of public education generally, rather than on the more specific context of public higher education. But in casting its inquiry at that level of generality, the Court of Appeals simply followed this Court's decision in *Lane*. See Pet. App. 15. There, the Court addressed the entire "class of cases implicating the accessibility of judicial services." *Lane*, 541 U.S. at 531. That class of cases was not limited to claims involving the denial of access to criminal defendants (like Lane, one of the two respondents in that case) or to court reporters (like Jones, the other respondent). As the First Circuit emphasized, it encompassed as well denials of access to "civil litigants, jurors, public spectators, the press, and witnesses." Pet. App. 15; see *Lane*, 541 U.S. at 523, 525 n.14, 527 (relying on the constitutional rights of that broad array of individuals who seek access to the courts). That categorical approach was an essential part of *Lane*'s focus on Title II's *prophylactic* justification, under which Congress "may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Lane*, 541 U.S. at 533 n.2 (quoting *Kimel v. Board of*

Regents, 528 U.S. 62, 81 (2000)). The First Circuit's use of a similar categorical approach here can hardly warrant the exercise of this Court's certiorari jurisdiction.

In any event, there is no reason to believe that the First Circuit's decision would have been any different had it focused on the more narrow category of public higher education. Indeed, the Fourth Circuit's decision upholding Title II's abrogation of sovereign immunity in the education context explicitly limited its analysis to "the context of public *higher* education." *Constantine*, 411 F.3d at 488 (emphasis added). And the ADA's legislative history contains significant evidence of irrational disability-based discrimination by public universities.[7] Even if the Court of Appeals should have (contrary to this Court's approach in *Lane*) specifically limited its analysis to the narrow context of public higher education, the failure to do so does not warrant certiorari. See *California v. Rooney*, 483 U.S. 307, 311 (1987) (*per curiam*) ("This Court reviews judgments, not statements in opinions.") (internal quotation marks omitted).

b. Second, Petitioner contends (Pet. 23-24) that the First Circuit erred by failing to engage in two separate Section 5 inquiries: a first to determine whether Title II's substance is congruent and proportional to actual or threatened constitutional violations, and a second to determine whether a

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[7] See 2 *Leg. Hist.*, *supra*, at 1162, 1224, 1225, 1617; Lodging of the United States, *Board of Trustees v. Garrett*, No. 99-1240, at 1010 (Missouri), 1384 (Oregon), 1476 (South Dakota), 1733 (Washington), 1757 (New Mexico).

damages remedy against states is "appropriate[]." Pet. 24. According to Petitioner, "even if this Court were to conclude that Congress does have the authority under § 5 to require, with respect to a given class of conduct, States to comply with Title II's substantive provisions (which are enforceable through private suits for injunctive relief against State officers), it would not necessarily follow that Congress would *also* have the authority to abrogate the States' immunity." *Id.* at 23-24. Petitioner did not raise this argument in its briefing below, and the Court of Appeals accordingly had no opportunity to address it. In any event, that court committed no error.

The "congruence and proportionality" test that this Court has applied in its sovereign immunity cases is a means of determining whether Congress has exceeded its remedial power by seeking to "'decree the *substance* of the Fourteenth Amendment's restrictions on the States.'" *Kimel*, 528 U.S. at 81 (quoting *City of Boerne*, 521 U.S. at 519). It does not limit Congress's unquestioned power to determine the remedies for violation of an otherwise constitutional statute. Where the substantive obligations that Congress has imposed on the States satisfy the congruence and proportionality test, nothing in Section 5 demands an additional showing to justify a damages remedy to enforce those obligations. Nor does anything in sovereign immunity doctrine demand such a showing. This Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), makes clear that, so long as Congress has Section 5 power to impose a given substantive rule on the

States, sovereign immunity does not limit the power of Congress to impose any remedy, damages or otherwise, for a violation of that rule. See *id.* at 456 (Eleventh Amendment no obstacle "[w]hen Congress acts pursuant to § 5").

Indeed, *none* of this Court's cases since *Seminole Tribe* and *City of Boerne* has demanded a separate showing that a damages remedy is congruent and proportional. In both *Lane* and *Hibbs*, this Court examined the *substantive* requirements of the statutes at issue; upon finding that those substantive requirements were valid prophylactic legislation, the Court upheld Congress's abrogation of sovereign immunity as a matter of course. See *Lane*, 541 U.S. at 530-534; *Hibbs*, 538 U.S. at 435-438. *Florida Prepaid*, on which Petitioner relies, is not to the contrary. There, the Court did not hold that the Patent Remedy Act would have been valid Section 5 legislation if it had provided for nothing more than injunctive relief (a point that would have been moot anyway, as an injunctive remedy for patent infringement could have been justified under Article I). Instead, it held that the States had engaged in an insufficient pattern of constitutional violations to justify *any* prophylactic Section 5 remedy in the patent infringement context. See *Florida Prepaid*, 527 U.S. at 643-648. Just as this Court did in *Lane*, the First Circuit properly focused its Section 5 inquiry on the substantive obligations Title II imposes; the Court of Appeals properly declined to require a separate showing that a damages remedy was necessary.

c. Finally, Petitioner contends (Pet. 25-26) that a federal statute may validly abrogate state sovereign immunity in only two circumstances: (1) when violations of the statute "constitute independent violations of the Fourteenth Amendment"; and (2) when violations of the statute "involve infringements of interests subject to heightened scrutiny." That argument finds no support in this Court's cases. Although it is clear that Congress *does* have power to abrogate state sovereign immunity in the two circumstances Petitioner discusses, see *Georgia*, 126 S. Ct. at 881-882 (independent violation of the Fourteenth Amendment); *Hibbs*, 538 U.S. at 722 (heightened scrutiny), this Court has never held that Congress's Section 5 power is limited to those two circumstances.[8] Instead, the Court has set forth a unitary test for evaluating legislation that purports to enforce the Fourteenth Amendment, whatever Fourteenth Amendment rights it purports to enforce: "Section 5 legislation is valid if it exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end.'" *Lane*, 541 U.S. at 520 (quoting *Boerne*, 521 U.S. at 520). That test permits Congress to adopt "reasonable prophylactic measure[s]," which "may prohibit 'a somewhat broader swath of conduct, including that which is not

[8] In *Lane*, 541 U.S. at 532 n.20, the Court specifically left open the question "whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne*'s prohibition on irrational discrimination."

itself forbidden by the Amendment's text.'" *Id.* at 533 & n.24 (quoting *Kimel*, 528 U.S. at 81).[9]

Where, as here, Congress acts in response to a significant "history and pattern" of constitutional violations, *Garrett*, 531 U.S. at 368, or its statute applies to state conduct that has "a significant likelihood of being unconstitutional," *Boerne*, 521 U.S. at 532, prophylactic legislation is appropriate. Petitioner asserts that this Court should create a hierarchy of Fourteenth Amendment violations when assessing Congress's enforcement of that Amendment, but that makes no sense. A constitutional violation is a constitutional violation, whether it involves conduct that fails heightened scrutiny, conduct that fails the rational basis test, or conduct that contravenes some other constitutional doctrine. The First Circuit properly declined to limit Congress's prophylactic power to statutes that implicate conduct that triggers the judge-made doctrine of heightened scrutiny.

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[9] In any event, Petitioner's premise is faulty. Respondent Toledo's complaint, which must be taken as true at the pleading stage, *did* allege that Petitioner irrationally discriminated against him on the basis of his disability. See pp. 1-3, *supra*. As the Court of Appeals recognized, Toledo "claim[ed] that the Dean and his professor gave him a failing grade in his design class because of their 'discriminatory animus' and that his design professor treated him differently from other students who arrived late to class." Pet. App. 11. In ruling to the contrary, the court simply observed that Toledo had not specifically identified in his complaint any other students who had similar records of tardiness and who received more favorable treatment. *Id.* at 12. That ruling was inconsistent with the liberal notice-pleading regime of the Federal Rules of Civil Procedure. As this Court made clear in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-513 (2002), the Federal Rules do not require a plaintiff to plead with particularity the facts underlying a claim of intentional discrimination.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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February 5, 2007